

**DISSENTING STATEMENT OF
COMMISSIONER NATHAN SIMINGTON**

Re: *Promoting Competition in the American Economy: Cable Operator and DBS Provider Billing Practices*, MB Docket. No. 23-405

This item proposes to prohibit cable and satellite operators from charging early termination fees and so-called "billing cycle fees." I've never met a consumer who has not felt hard-done by paying fees that they would prefer not to pay. Certainly I have paid fees that I would have preferred not to pay, and I wished at the time that I didn't have to pay them. So, is that the end of the analysis?

Well, for this Commission, perhaps. At the behest of the Biden administration, Commission leadership and my colleagues across the aisle today approve an item notionally designed to improve consumer welfare through "prohibiting unjust or unreasonable early termination fees for end-user communication contracts[.]" and by "enabling consumers to more easily switch providers." I say notional because the relationship between consumer welfare and the rules this item proposes is actually negative. Let me be clear: consumers will be *worse* off after these rules are adopted—provided that the rules survive legal challenge, including a challenge to the almost certainly inadequate Section 632 authority on which they are based. Consumers will pay *more* for their cable packages. This isn't advanced economic theory, this is basic horse sense. By replacing consumer choice with the sacerdotal wisdom of the new regulatory clerics, the Commission proposes to leave consumers *worse* off than before. Here's how. Let's treat ETFs first.

The modal consumer who signs up for service with an MVPD (and, to be clear, I will use 'MVPD' to mean both MVPDs and DBS providers) generally has at least two options. One option is discounted service, which often comes with a contract for a service term. Some of those contracts do have an early termination fee—often at a somewhat lower price relative to other contracts—and some do not. The other option is a higher-rate, month-to-month service agreement. In the first case, a consumer terminating service prior to the end of the term is sometimes obligated to pay a fee; in the second, she is not.

Any consumer wishing to avoid the prospect of an early termination fee has the option, *ex ante*, to avoid the fee. Just don't sign up for the plan that has the fee. Seems simple enough. But, some may say: what about the consumer who signs up for the plan but then is forced by circumstance to terminate the contract? Say she has to move for a new job, and the prior MVPD is not available in her new location. Is the fee not punitive in this case?

Well, tabling for the moment that the consumer presumably knew or could have discovered what she was signing up for, *and* tabling for the moment that the contract terms *provide* for a variety of circumstances under which the ETF is not owed, she is *still* better off, generally speaking, in the second half of service term contracts than she otherwise would have been. If a contract for video service offers a \$10 monthly discounted promotional rate for a one year term, it is often joined with an early termination fee amounts to, in the case of one major provider, \$110. The early termination fee declines, generally, by 1/12th or 1/11th per month—this is a pretty universal industry practice. So, in literally half of the cases, assuming terminations occur randomly in a contract lifetime, the consumer is *better off having paid* the ETF and received the discounted service relative to the month-to-month service. Indeed, the discount is often *greater* on a monthly basis than the ETF reduction, putting the ETF-paying consumer in the money even faster. This is not the only case, but it is an archetypical one.

But now we are proposing to eliminate the prospect of the early termination fee altogether, and constructively proposing to eliminate the discounted rate that it supports—at least, the portion of the discount equivalent to the revenue lost by ETFs—and we are doing this in the name of consumer welfare. I am not sure what animates the Commission's logic here. Does the Commission imagine that the

invisible hand of this highly regulated market will keep contractual prices level after ETFs are removed (those same market forces that the Commission evidently discounts today by undercutting the commercial judgment of MVPDs)? Or does it imagine that MVPDs will, out of their gracious love of consumers, voluntarily fully retain today's long-term contractual discounts while merely doing without ETF revenue? Which of this twin naivetes will this rulemaking embrace? I suppose we'll find out when the supposed consumer advocates, whose very jobs require the invention of more and more phantasmagoric consumer harms, furnish the Commission with their conclusory cant in the record.

Turning briefly to what we term in the item "billing cycle fees," and what the rest of the world calls monthly billing, here are some folks who typically aren't going to take you call if you ask for part of the month you paid for back in your subscription service: Netflix. Hulu. Max. Disney. Paramount. YouTube. Spotify. Apple. Do we typically consider these services difficult to cancel? Is it hard to switch between and among them? Given their churn figures, I would be surprised to learn that that were the case. Consumer choice in the video marketplace abounds, and today, consumers are exercising that choice. They're marching right out the door from traditional MVPDs. Today's proposed action on monthly billing will make it marginally harder to operate as an MVPD, in that it puts a costly burden on them that no other video marketplace participant is required by law to bear. It may not be the proverbial straw on the camel's back, but the pro-consumer effect of today's proposal will certainly be a mirage. Rather than improving the consumer experience, it will just make the experience for most MVPD consumers marginally worse, as MVPDs recoup lost revenues in the form of higher monthly service costs overall.

Because, let's be clear, our so-called "pro-consumer" proposal today requires angelic forbearance on the parts of MVPDs to have actual pro-consumer effect. Putting this plainly: this proposal will reduce consumer choice, make it harder for MVPDs to compete in the unified video marketplace, and it won't save consumers one thin dime. Today's proposal is merely an optical victory.

Now that the Commission has a full slate of Commissioners, the hour of partisan politics has come round at last, and today's crypto rate regulation slouches toward approval. I dissent.